



DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[Docket ID: DOD-2019-HA-0090]

RIN 0720-AB76

TRICARE; Reserve and Guard Family Member Benefits; Early Eligibility TRICARE and Transitional Assistance Management Program for Certain Reserve Component Members; Extended TRICARE Program Coverage for Certain National Guard Members

ACTION: Proposed rule.

SUMMARY: This rulemaking proposes changes to implement provisions of the National Defense Authorization Act for Fiscal Year 2017 (NDAA-17) to continue TRICARE program coverage for certain members of the National Guard and their dependents during certain disaster response duty. This applies discretionary authority broadened by NDAA-17 to propose expansion of the TRICARE Reserve and Guard Family Benefits program to all families of Reserve Component (RC) members on active duty for more than 30 days, except for the families of RC members performing active Guard and Reserve (AGR) duty for a period of 180 consecutive days or more. This rulemaking also proposes to expand both early eligibility TRICARE coverage and Transitional Assistance Management Program (TAMP) coverage to RC members on active duty for some pre-planned missions.

DATES: Written comments received at the address indicated in the ADDRESSES section by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] will be accepted.

ADDRESSES: You may submit comments, identified by docket number and/or Regulation Identifier Number (RIN) number and title, by any of the following methods:

Federal eRulemaking Portal: [http:// www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name and docket number or RIN for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at [http:// www.regulations.gov](http://www.regulations.gov) as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Brian Smith, Defense Health Agency, TRICARE Health Plan, telephone (303) 676-3729.

SUPPLEMENTARY INFORMATION:

I. Introduction and Background

Guardsmen on full-time National Guard duty under §502(f) of 32 U.S.C. 502(f) who were called to state active duty (SAD) for disaster response duty, lost their premium-free TRICARE coverage. This rule implements authority under 10 U.S.C. 1076f (added by §711 of NDAA-17 (Pub. L. 114-328)) and proposes to continue TRICARE coverage to these members of the National Guard (NG) and their eligible family members, upon request of the state/territory on a fully reimbursable basis. The TRICARE Guard and Reserve Family Benefits (TRGFB) program has successfully eased the transition for RC families to and from TRICARE since its inception

under demonstration authority in September 2001. Section 748(b) of NDAA-17 extends TRGFB to eligible family members of any RC member who is on active duty for more than 30 days, amending prior legislation that required the active duty be in support of a contingency operation. Transition has also been eased by early eligibility TRICARE coverage that started in 2004, which is also when the long-standing TAMP program had its period of coverage extended to 180 days. Section 511 of NDAA-18 expands eligibility for these programs to more RC members and their families under recently amended statutes.

II. Continued TRICARE Program Coverage (§199.3)

Prior to §711 of NDAA-17, premium-free TRICARE coverage terminated for members of the NG on full-time NG duty (FTNGD) under 502(f) of title 32, when they commenced state active duty (SAD) including response to certain disasters upon a call to duty by the state/territory. There is no federal statutory entitlement to premium-free health care at Department of Defense (DoD) expense during SAD since it is a state responsibility and not federal responsibility. However, performing SAD does not disqualify them from TRICARE Reserve Select 10 U.S.C. 1076f. Section 711 of NDAA-17 authorizes the state/territory request TRICARE coverage to continue when NG members transfer from FTNGD to SAD in response to certain disasters and reimburse the DoD for all health care received by NG and their family members in military treatment facilities or purchased from civilian providers.

III. Expansion of TRICARE Reserve and Guard Family Benefits Program (§199.14)

Prior to §748(b) of NDAA-17, discretionary authority to pay non-network, TRICARE authorized providers up to 115% of the CHAMPUS Maximum Allowable Charge (CMAC) contained in 10 U.S.C. 1079(h)(4)(C)(ii) applied only to families of RC sponsors who had been activated for more than 30 days in support of a contingency operation as defined in

10 U.S.C. 101(a)(13). In contrast, prior discretionary authority to waive the TRICARE deductible (10 U.S.C. 1095d(a) added by §714 of NDAA-99 (Pub. L. 106-65)) never contained the limitation that the RC sponsor's activation to be "in support of a contingency operation." For consistency, during the demonstration and continuing in the permanent program to the present, the Department aligned these provisions by offering both features only to families of RC sponsors who had been activated for more than 30 days in support of a contingency operation.

Together, these two features comprise the TRICARE Reserve and Guard Family Benefits program that help ensure timely access to healthcare and maintain clinically appropriate continuity of healthcare to family members of activated RC members, appropriately limit the out-of-pocket expenses for those family members, and remove potential barriers to healthcare access by families in order to improve the morale and retention of RC members.

This proposed rule applies discretionary authority broadened by §748(b) of NDAA-17 to expand both the increased payment to providers feature and the waiver of deductible feature to all families of RC members on active duty for more than 30 days, except for the families of RC members performing AGR duty for a period of 180 consecutive days or more (as defined in 10 U.S.C. 101(d)(6)); including full-time support (FTS) members of the U.S. Navy Reserve and U.S. Marine Corps Reserve. While AGR members are in the Selected Reserve, their current and future and medical benefits as well as their retirement benefits compare to the full-time Active Components. Adding these features to their current medical benefits would make their medical benefit better than their Active Component colleagues. Additionally, the career path of an AGR member has the potential for twenty years of cumulative active service leading to a regular retirement (10 U.S.C. chapter 367 [Army], chapter 571 [Navy and Marine Corps], and chapter 867 [Air Force]) with medical eligibility immediately upon retirement, rather the non-regular

retirement common to RC members (10 U.S.C. subtitle E, part II) that delays medical eligibility until the RC sponsor reaches age 60. Because AGR members, and their eligible family members, have benefits comparable to members on active duty, and their eligible family members, the Department sees the authority of §748(b) of NDAA-17 as inapplicable to their circumstances.

A. Waiver of deductible (§ 199.4(f)(2)(i)(H)). Eligible family members of RC sponsors called or ordered to active duty for more than 30 days and who are enrolled in TRICARE Select would not be responsible for paying the annual deductible under TRICARE Select associated with their sponsor's qualifying active duty. Considering that many may have already paid annual deductibles under their health plan prior to enrolling in TRICARE Select, waiving this annual deductible appropriately limits out-of-pocket expenses for many RC family households.

B. Increased payment to providers (§ 199.14(j)(1)(i)(E)). This feature increases TRICARE payments up to 115 percent of the CMAC, for TRICARE covered outpatient care received from a TRICARE authorized provider who does not participate (accept assignment) under TRICARE. This helps make it possible for RC family members to continue seeing civilian providers with whom they might have established relationships (i.e. access) while promoting clinically appropriate continuity of care. Section 748(b) of NDAA-17 expanded the discretionary authority for increased TRICARE payments to providers by removing the limitation from the statute (10 U.S.C. 1079(h)(4)(C)(ii)) that had required the RC sponsor's activation be "in support of a contingency operation."

IV. Expansion of Early Eligibility TRICARE and TAMP to Certain RC Members

Section 511 of NDAA-18 amended 10 U.S.C. 1074(d)(2) to expand both early eligibility TRICARE and TAMP coverage to RC members called or ordered to active duty for pre-planned missions under 10 U.S.C. 12304b. Previously, law provided these benefits to RC members (and

their eligible family members) only in conjunction with a call or order to active duty for more than 30 days in support of a contingency operation (10 U.S.C. 101(a)(13)(B)). Until enactment of §511, duty for pre-planned missions had not been included in the discretionary authority for early eligibility TRICARE and TAMP benefits.

The definition for contingency operation includes military duty under 10 U.S.C. 101(a)(13)(A) and (B), but §511 amendment specifies duty under subparagraph (B) in particular for both early eligibility TRICARE and TAMP. In addition to a contingency operation under subparagraph (B), this rule proposes to offer these benefits for duty described under subparagraph (A) as well: military duty designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force.

A. Early Eligibility TRICARE (§ 199.3(b)(5)(i)). Certain RC members who are issued delayed-effective-date orders for active duty of more than 30 days for a preplanned mission or in support of a contingency operation, would receive up to 180 days of early eligibility TRICARE coverage for themselves and their eligible family members beginning on the later of the date of the issuance of such order or 180 days before the date on which the period of active duty is to commence under such order. In addition to member readiness, this early eligibility TRICARE contributes to family readiness by providing a period of time for the family to adjust in advance to TRICARE coverage before the RC member's reporting date for activation.

B. Transitional Assistance Management Program (§ 199.3(e)(ii)). TAMP extends TRICARE eligibility for 180 days after separation from active duty so individuals have a generous amount of time to make arrangements for other health coverage for themselves and

their families. In addition to RC members activated for more than 30 days in support of a contingency operation, RC members separating from active duty for a preplanned mission under 10 U.S.C. 12304b would gain TAMP coverage for themselves and their eligible family members.

V. Regulatory Analysis

We developed this rule after considering numerous statutes and Executive Orders (E.O.s) related to rulemaking. Below we summarize our analyses based on these statutes or E.O.s.

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as a “not significant” regulatory action, and not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB) under the requirements of these Executive Orders.

Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs) directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.” This proposed rule is not expected to be subject to the requirements of this Executive Order because it is not significant under Executive Order 12866.

1. Costs

By removing the requirement that the disaster response duty be federal in order for Guardsmen to be eligible for TRICARE coverage, the States may see an increase of costs to be reimbursed to DoD. These additional costs, however, are expected to be de minimis because this expansion of eligibility to State disaster response duty will only impact a very small portion of the Guard population. These minimal additional costs are incurred at the request of the State for TRICARE coverage of Guardsmen, and upon the agreement that those costs be reimbursed to DoD. For this reason, States allocate health care funding and programs for Guardsmen and their families during State disaster response duty. Because States would fully reimburse the DoD for the cost of TRICARE coverage under §711 of NDAA-17, there is an assumption of zero net cost impact to DoD.

Estimated costs to the Department with providing early eligibility TRICARE and TAMP coverage, as well as extending the existing deductible waiver and balance billing protection for all families of reservists utilizing TRICARE Select coverage to the entitled populations identified, is a total of \$146 million from calendar years 2019 through 2023 (an average of \$29.2 million a year); \$73.3 million associated with §748(b) of NDAA-17 and \$72.7 million associated with §511 of NDAA-18.

We anticipate costs to the Government for administrative start-up fees from the managed care support contractors to be \$230,290. These start-up costs will be incorporated in contracts and absorbed by DoD. This estimate was based on the contract modifications regarding impact assessment and requirements developments (\$47,880), Information Technology systems updates (\$26,085), and administrative services the Managed Care Support Contractors (\$156,325) would need to conduct to support these enhanced benefits. The calculations are below.

Under the third generation of TRICARE contracts (T3) for the TRICARE Overseas Program Managed Care Support Contractor (MCSC), the estimated cost regarding assessment and requirements development for the subcontractor were derived from an hourly rate of \$56 at the level of effort (LOE) of 80 hours equals \$4,480 ($\$56 \text{ hourly wage} * 80 \text{ hours}$), and for the primary MCSC, an hourly rate of \$124 at 80 hours equals \$9,920 ($\$124 \text{ hourly wage} * 80 \text{ hours}$). Additionally for the subcontractor, estimated costs with adjusted administrative services were LOE of 270 hours at \$124 an hour equals \$33,480 ($\$124 \text{ hourly wage} * 270 \text{ hours}$), and for IT start-up to support the additional benefit and population, the estimate was allocated at 50% of 235 hours at \$111 an hour equals \$26,085 ($\$111 \text{ hourly wage} * 235 \text{ hours}$).

Under the fourth generation of TRICARE Contracts (T17) for MCSCs, the estimated cost regarding assessment and requirements development for the subcontractor in each of the East and West Regions were derived from an hourly rate of \$56 at the LOE of 80 hours and for the primary MCSCs, an hourly rate of \$74 at 80 hours equals \$5,920 ($\$124 \text{ hourly wage} * 80 \text{ hours}$) for the East Region and an hourly rate of \$124 at 80 hours equals \$9,920 ($\$124 \text{ hourly wage} * 80 \text{ hours}$) for the West Region. Additionally for the subcontractors, estimated costs with adjusted administrative services were at a LOE of 270 hours at \$56 an hour equals \$15,120 ($\$56 \text{ hourly wage} * 270 \text{ hours}$) for the East Region and 270 hours at \$124 an hour equals \$33,480 ($\$124 \text{ hourly wage} * 270 \text{ hours}$) for the West Region. For IT start-up to support the additional benefit and population in each Region, the estimate was allocated at 50% of 470 hours at \$111 an hour equals \$26,085 [$(\$111 \text{ hourly wage} * 470 \text{ hours})/2$] for the East Region and allocated at 100% of 470 hours at \$140 an hour equals \$65,800 ($\$140 \text{ hourly wage} * 470 \text{ hours}$) for the West Region.

2. Benefits

This rule proposes revisions to the requirements and procedures for all eligible family members of Reserve Component (RC) members activated more than 30 days who utilize the TRICARE Select program, proposes to expand Early TRICARE eligibility and TAMP to those RC members, and their eligible family members, who receive delay-effective-date active duty orders for more than 30 days in support of a contingency operation or a preplanned mission, and proposes to provide TRICARE program benefits to those Guardsmen, and their eligible family members, who were on Title 32, 502f Active Guard/Reserve orders and receive state active duty orders in support of a natural disaster.

3. Alternatives

In proposing this rule, we have considered two alternatives:

a. Alternative 1: No Action. Failure to implement this rule will mean that TRICARE regulations are not in compliance with the changes mandated by TRICARE statutory provisions.

b. Alternative 2: Next Best Action. The next best alternative is to waive the annual deductible within the first CY of an activation only, for family members of RC members activated more than 30 days while in a continuous period of active duty who utilize TRICARE Select coverage, and not waive the annual deductible for subsequent CY years; per activation lasting more than 12 months or less than 12 months that carries into a second calendar year.

While this would provide an estimated cost savings to the Department of \$6.6 million from the proposed costing, the potential of exposing this beneficiary population to other annual deductibles under similar coverage with private insurance is likely. This course of action is not preferred.

B. Congressional Review Act (5 U.S.C. § 801, et seq.)

Under the Congressional Review Act, a major rule may not take effect until at least 60 days after submission to Congress of a report regarding the rule. A major rule is one that would have an annual effect on the economy of \$100 million or more or have certain other impacts. This rule is not a major rule under the Congressional Review Act.

C. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This rule will not impose any impacts on any small entities. This means that there will be no economic impacts on any small entities.

Therefore, the Department of Defense under 5 U.S.C. 601-612 certifies that this rule will not have a significant economic impact on a substantial number of small entities.

D. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person in the FOR FURTHER INFORMATION CONTACT section of this rule.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture

Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531-1538, requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100 million in 1995 (adjusted for inflation) or more in any 1 year.

Although this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Collection of Information

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501-3520) applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, ten or more members of the public. This rule does not impose requirements under the PRA.

G. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule does not have federalism implications that warrant the preparation of a federalism assessment in accordance with Executive Order 13132.

List of Subjects in 32 CFR Part 199

Claims, Dental health, Health care, Health insurance, Individuals with disabilities,
Military personnel.

Accordingly, 32 CFR part 199 is proposed to be amended as follows:

PART 199—[AMENDED]

1. The authority citation for part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. chapter 55.

2. Amend § 199.2(b) by adding the definition of “Disaster response duty” in alphabetical order to read as follows:

§ 199.2 Definitions.

* * * * *

(b) * * *

Disaster response duty. Duty performed by a member of the National Guard in State status pursuant to an emergency declaration by the Governor of the State (or, with respect to the District of Columbia, the mayor of the District of Columbia) in response to a disaster or in preparation for an imminent disaster.

* * * * *

3. Amend § 199.3 by:

- a. Revising paragraphs (b)(5)(i) and (b)(5)(iii)(A) introductory text;
- b. Adding paragraph (b)(6); and
- c. Revising paragraph (e)(1)(ii).

The revisions and additions read as follows:

§ 199.3 Eligibility.

* * * * *

(b) * * *

(5) * * *

(i) *Member.* A member who is issued a delayed-effective-date active-duty order for a period of more than 30 consecutive days that provides for active-duty service to begin under such order on a date after the date of the issuance of the order who is either:

(A) A member of a Reserve Component of the armed forces who is ordered to active duty in support of a contingency operation under 10 U.S.C. 101(a)(13); or

(B) A member of the Selected Reserve who is ordered to active duty for a preplanned mission under 10 U.S.C. 12304b.

* * * * *

(iii) * * *

(A) The eligibility established by paragraphs (b)(5)(i)(A) of this section shall begin on or after November 6, 2003 and the eligibility established by paragraphs (b)(5)(i)(B) of this section shall begin on or after December 12, 2017, and shall be effective on the later of the date that is:

* * * * *

(6) *Certain members of the National Guard during certain disaster response duty.* (i) *Member.* A member of the National Guard performing disaster response duty immediately following a period in which the member served on full-time National Guard duty under 32 U.S.C. 502(f).

(ii) *Dependents.* CHAMPUS eligible dependents under this paragraph (b)(6) are those identified in paragraphs (b)(2)(i) (except former spouses) and (b)(2)(ii) of this section.

(iii) *Effective date.* The authority established by paragraphs (b)(6)(i) and (ii) of this section shall begin on or after December 23, 2016.

(iv) *Termination date.* The eligibility established by paragraphs (b)(6)(i) and (ii) of this section terminates upon the date the state active duty for disaster response duty terminates, or any date prior, as determined by the State.

(v) In this part, the term “disaster response duty” is defined in § 199.2(b).

* * * * *

(e) * * *

(1) * * *

(ii) A member of a Reserve Component who is separated from active duty served more than 30 consecutive days to which called or ordered either in support of a contingency operation under 10 U.S.C. 101(a)(13) or for a preplanned mission under 10 U.S.C. 10304b.

* * * * *

4. Amend § 199.4 by revising paragraph (f)(2)(i)(H) to read as follows:

§ 199.4 Basic program benefits.

* * * * *

(f) * * *

(2) * * *

(i) * * *

(H) The Director, Defense Health Agency, may waive the annual individual or family calendar year deductible for dependents of a Reserve Component member who is called or ordered to active duty for a period of more than 30 days, except for a Reserve Component

member who is called or ordered to active Guard and Reserve duty for a period of more than 180 days as defined by 10 U.S.C. 101(d)(6).

* * * * *

5. Amend § 199.14 by revising paragraph (j)(1)(i)(E) to read as follows:

§ 199.14 Provider reimbursement methods.

* * * * *

(j) * * *

(1) * * *

(i) * * *

(E) *Special rule for certain TRICARE Select enrollees.* In the case of TRICARE Select enrolled-dependent spouse or child, as defined in § 199.3(b)(2)(ii)(A) through (F) and (b)(2)(ii)(H)(1), (2), and (4), of a Reserve Component member serving on active duty pursuant to a call or order to active duty for a period of more than 30 days, except for a RC member who is called or ordered to active Guard and Reserve duty for a period of more than 180 days under 10 U.S.C. 101(d)(6), the Director, Defense Health Agency, may authorize non participating providers the allowable charge to be the CMAC level as established in paragraph (j)(1)(i)(B) of this section plus any balance billing amount up to the balance billing limit as referred to in paragraph (j)(1)(i)(C) of this section.

* * * * *

Dated: September 19, 2019.

Shelly E. Finke,

Alternate OSD Federal Register Liaison `

Officer, Department of Defense.

[FR Doc. 2019-20621 Filed: 9/25/2019 8:45 am; Publication Date: 9/26/2019]